IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1562 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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BHUSHAN ALIAS GULSHAN BALVIR RAJPUR

Versus

COMMISSIONER OF POLICE

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Appearance:

MR JK PARMAR for Petitioner

Mr. Kamal Mehta, AGP for Respondents.

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 23/04/98

ORAL JUDGEMENT

The petitioner is kept under detention passing the order of detention on 21st October 1997. The order of detention is passed by the Police Commissioner for the city of Ahmedabad invoking the powers under Section 3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"). By this application under Article 226 of the Constitution of India, the petitioner challenges the legality and validity of the order of detention passed against him.

2. Tersely put and shorn of unnecessary details, the facts, which led the petitioner to prefer this application, may be stated. Against the petitioner, about four complaints came to be lodged of the offences under Section 379 read with Section 114 of the Indian Penal Code. After detailed investigation, the Commissioner of Police was shocked to know that the petitioner had indulged in different types of nefarious and subversive activities and was going on committing different wrongs. He was terrorising the people, and using the force he was extorting money. Those who opposed him had to face dire consequences. Every one was therefore worrying about his safety, no one was therefore willing to lodge the complaint or make the statement against the petitioner, every one thought it wise to keep his lips tight and bear the situation. The Police Commissioner tried to record the statements of the concerned persons, but no one was willing to make the statement. After considerable persuation and when the assurance was given that their details disclosing their identity would be kept secret, some of the persons showed their willingness to give statements. After the statements were perused the Police Commissioner was satisfied about the fact that the petitioner was a dangerous person, i.e. a tartar or a demimator, and by his several subversive activities he was terrorising the people. No one was therefore feeling safe. He therefore thought it fit to have stern action against the petitioner so that the people might feel free and public order could be maintained, but he found that whatever action under general law if taken would yield no result as the general law was falling short to curb his subversive and chaotic activities. After cogitation he thought it fit to pass the order in question. Consequently the order in question came to be passed and petitioner at present is kept under detention. To challenge the legality and validity of that order, this application has been filed.

3. The petitioner has challenged the order in question on several grounds, but at the time of submissions, his learned advocate tapered off his submissions confining to the only point namely exercise of privilege under Section 9(2) of the Act. According to him, there was no justification to exercise the privilege and suppress the particulars about the witnesses. The petitioner had a right to know the sources of information so that while making the representation he could say whether the particular statement is reliable or not, or why the particular statement is made against him. For want of those particulars i.e. source, the right to make

effective representation was jeopardised and therefore the order of detention was arbitrary and illegal. Without application of mind, the Police Commissioner accepted the report in this regard and exercised the privilege which vitiated his subjective satisfaction.

4. In reply to such contention raised, Mr. U.R. Bhatt, the learned AGP submitted that every material placed before him, was considered applying mind. The Police Commissioner then found that in the interest of public the particulars about the witnesses were required to be withheld, and accordingly were not disclosed which was quite in consonance with the provision of Section 9(2) of the Act. There is therefore no reason to interfere with the order passed on the ground of exercise of privilege. When both have confined to the only point going to the root of the case, I will deal with the same without dwelling upon the other grounds.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for

disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority, namely the Police Commissioner for the city of Ahmedabad was required to file the affidavit and satisfy the court that it was in the public interest, mainly to protect the lives of the witnesses, absolutely necessary to withhold the particulars. It is pertinent to note that in this case explanatory affidavit is not filed by the Police Commissioner. When that is so, it should be assumed that without any just cause the particulars are suppressed. As the particulars were not given, naturally the petitioner could not know what defence was available to him, what were the reasons to state against him, and whether in fact those witnesses really stated so or whether they were really in existence ? Thus the right

to make effective representation is jeopardised. Further for want of explanatory affidavit, it can besaid that there was no just cause for being personally satisfied applying mind for non-discloser of facts i.e. about exercise of the privilege. It is stated that through another officer the Police Commissioner verified the fact, entrusting him the task of enquiry; and it seems he without any application of mind accepted the report made by that officer. Thus the personal satisfaction is also vitiated. The privilege exercised is therefore unjust. Consequently, the order of detention and continued detention must be held to be arbitrary and illegal.

7. For the aforesaid reasons, this application is required to be allowed. It is allowed accordingly. The order of detention dated 21st October 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule accordingly made absolute.

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(rmr).